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No. 71-1019

In the Supreme Court of the United States

OCTOBER TERM, 1971

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
PETITIONER

v.

MOORE OF BEDFORD, INC., and
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board (with Chairman Miller dissenting) held that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by insisting, as a condition to entering into a new collective bargaining agreement with petitioner Union, upon contract provisions which both permitted the Company to determine new piece-

work rates unilaterally and restricted grievances concerning such determinations to the question whether they provided employees with a fair opportunity to earn the base rate (Pet. App. 11a-21a).[1] This conclusion rested on the Board's finding that the Company's final offer was a base rate of $1.80 per hour, while the employees were currently averaging $2.55 per hour, and that the real effect of the Company's proposal was to enable it, through the setting of new piecework rates, to reduce wages substantially without consulting the Union or affording grounds for a grievance (Pet. App. 12a-14a, 40a-41a). The Board entered a remedial order (Pet. App. 16a-17a, 49a-50a).

The court of appeals declined to enforce the Board's order (Pet. App. 1a-10a). The court found, contrary to the Board, that "the Company never refused to negotiate the base rate," and therefore "the insistence upon limiting the arbitration and grievance procedure to whether or not the base rate could be earned was not to insist upon the right to set wages unilat-

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[1] The majority of the Company's employees at the Bedford plant had traditionally been paid on an incentive piecework basis. By this method, the amount of compensation received by an employee is determined by the combination of the rate set for each different operation he performs and the number of times he satisfactorily performs such operation. The prior contract permitted the Company to adjust piecework rates unilaterally, subject to the proviso that an employee, with the exercise of incentive effort, could earn the base rate, which was set at $1.70 per hour. (Pet. App. 3a-5a.)

erally throughout the life of the contract" (Pet. App. 7a).[2]

2. While the Board believes that substantial evidence supports its finding that the Company insisted on a base rate which in context was so low as to be meaningless and that thus the court of appeals should have sustained that finding, in the Board's view the court's action presents only an evidentiary issue, which this Court has indicated it will not review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490; *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 410. For this reason, the Board did not file its own petition.

Moreover, while the Board agrees that the court below also erred in declining to sustain its unfair labor practice findings in "J. P. Stevens VI and VII" (Pet. 18),[3] in the Board's judgment the decisions in

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[2] The court added (Pet. App. 8a-9a):

> The last offer made by the Company was a base rate which varied from $1.80 to $2.00 depending on the employee classification. Nowhere does it appear that this was a final non-negotiable proposal. Furthermore, it seems that this proposal was the last one only because the Union voted to strike shortly after it was made. In short, there is simply no evidence that the Company refused to negotiate the base rate. * * * [And,] if the base rate were raised sufficiently, the Company would not have unilateral *control* over wages * * *.

[3] *Black Hawk Corporation* v. *National Labor Relations Board*, 431 F. 2d 900 (C.A. 4), union petition for certiorari denied, 401 U.S. 911; *J. P. Stevens & Co.* v. *National Labor Relations Board*, 449 F. 2d 595 (C.A. 4). (The union's pe-

those cases and in the present case do not establish that the Fourth Circuit has so consistently misapplied the "substantial evidence" standard of review as to warrant corrective action by this Court. See *J. P. Stevens & Co.* v. *National Labor Relations Board*, 406 F. 2d 1017 (C.A. 4); *Craddock Terry Shoe Corp.* v. *National Labor Relations Board*, No. 71-1060 (C.A. 4), order entered September 1, 1971, enforcing 187 NLRB No. 5; cf. *Wellington Mill Division, West Point Mfg. Co.* v. *National Labor Relations Board*, 330 F. 2d 579 (C.A. 4), Board petition for certiorari denied, 379 U.S. 882.

In sum, although the Board believes that the court below erred in failing to sustain the Board's unfair labor practice findings, it does not believe that an issue is presented which meets this Court's standards for certiorari. The petition should therefore be denied.

Respectfully submitted.

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Solicitor General.

PETER G. NASH,
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tition in *Black Hawk* was untimely, see Board's memorandum in opposition, No. 981, 1970 Term.)

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